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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

In re J.A., a Person Coming Under the Juvenile
Court Law.

MADERA COUNTY DEPARTMENT OF
SOCIAL SERVICES/CHILD WELFARE
SERVICES,

Plaintiff and Respondent,

v.

THERESA A.,

Defendant and Appellant.

F062761

(Super. Ct. No. MJP016721)

OPINION

APPEAL from a judgment of the Superior Court of Madera County. Thomas L. Bender, Judge.

Hana B. Balfour, under appointment by the Court of Appeal, for Defendant and Appellant.

Douglas W. Nelson, County Counsel, Miranda P. Neal and Woodrow C. Whitford, Deputy County Counsel, for Plaintiff and Respondent.

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Following a contested disposition hearing, the juvenile court removed J.A. from her mother's custody. Mother, Theresa A., argues that the juvenile court erred when it refused to return J.A. to her care and custody under court supervision. We disagree and affirm.

FACTUAL AND PROCEDURAL HISTORY

Three-year-old J.A. is mother's youngest child. In February of 2011, mother's four older children, who did not live with her, were removed from the custody of their father, Jose V., after allegations of physical and emotional abuse. During the investigation it was noted, based on a previous court ruling, that it was reasonable to suspect that the children had been determined to be at risk in the care of their noncustodial mother. At the subsequent disposition hearing for the four minors, April 5, 2011, it was determined that the children could not safely return to their biological father, nor could they safely return to mother because she lacked stable housing and had a chronic history of substance abuse. At the time, J.A. was not detained from mother and no petition was filed regarding her.

On April 11, 2011, a Welfare and Institutions Code section 300¹ petition was filed by the Madera County Department of Public Welfare (department) alleging that J.A. was at a substantial risk of harm due to mother's substance abuse.² The petition alleged that mother drug tested on March 8, 2011, through the probation department and the drug test was positive for amphetamines. The petition also alleged that mother was not compliant with her family reunification plan with her other four children, had not maintained contact with the department, and had not addressed her substance abuse issues. J.A. was placed in a nonrelative home with her half siblings.

¹Further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

²Jesus S. and Manuel F. are alleged fathers of J.A.; D.P. is the presumed father. None are a party to this appeal.

The report prepared in anticipation of the detention hearing stated that mother acknowledged that she had tested positive for drugs on March 8, 2011, but claimed she had tested for the probation department on March 11, 14, 21, and 28, 2011, and the results were negative. Mother was on probation for welfare fraud. She missed a drug test on April 4, 2011, but claimed it was rescheduled. When asked why she did not test for the department, as required by her family reunification plan, mother claimed not to know that she needed to do so. The report stated that there was a substantial danger to the physical health of J.A. and no reasonable means by which to protect her without removing her from mother's custody.

At the contested detention hearing held April 14, 2011, social worker Shanisha Augustine testified that mother has been addicted to methamphetamines for four years, she tested positive for drugs on March 8, 2011, and that she was noncompliant with her reunification plan involving her four older children, based on her lack of participation in a parenting class and by not staying in touch with Veronica Reyes, her social worker on that case.

Reyes testified that mother was noncompliant because she had not attended the required parenting classes. According to Reyes, mother did not want to attend parenting classes where the children's father was present, and she was waiting to take a class she could attend alone. Mother eventually did begin another parenting class. Reyes also testified that mother had not drug tested when required, and that Reyes had received a call from mother's probation officer stating he had concerns about her compliance with probation and drug testing as well. Reyes opined that mother's lack of compliance with probation and her refusal to test with the department were indicative that mother may have relapsed, which would put J.A. at risk of being neglected.

Probation officer Abinadi Cortes testified that he had supervised mother's probation for the past two months and during that time mother moved her residence three times and tested positive for drugs on February 1 and March 8, 2011. Contrary to

mother's assertion, she did not drug test on March 11, 14 or 21. She tested negative on March 29, 2011, but missed a drug test on April 4, 2011.

The juvenile court inquired on the record whether additional services for mother would allow J.A. to be maintained in the home with more intensive supervision, noting that J.A. appeared to be "cared for." Counsel for the department argued against it, citing mother's drug use over the past four years and her failure to comply with the plan involving her other four children. Minor's counsel noted mother's inconsistencies in telling the social worker she tested for probation on three dates when, in fact, she didn't, as well as her positive drugs tests during the time period when her older children were going through the dependency process.

The juvenile court eventually determined that it would detain J.A. but revisit the issue at the next hearing. The court stated that it would review J.A.'s detention status once it had a supplemental report addressing the following: (1) all of the referrals for mother's other case plan and whether she was compliant; (2) a home inspection by child protective services; and (3) the results of any drug test by mother during the interim period.

In the jurisdiction report, mother admitted using drugs on March 8, 2011, but stated that J.A. was with grandparents at the time. The jurisdiction report stated that, as of May 2, 2011, mother had completed an intake assessment and one group counseling session, attended one Narcotics Anonymous meeting and provided a negative drug test on April 16, 2011, but she had not yet begun to address her "mental health issues." While mother was attending a parenting class, the class was intended to meet the needs of teenagers (her older children), and it did not "address the needs of a three year old." Mother was referred to an appropriate parenting class to address J.A.'s "defiant and at times aggressive behaviors."

At the time of the May 5, 2011, scheduled jurisdiction hearing, the department had filed a first amended petition with the added allegation that J.A. was the half sibling of the four V. minors, all of whom were adjudged dependents of the court, and that the court

had found placement with mother would be detrimental due to her on-going substance abuse issues. (§ 300, subd. (j).) Mother requested a contested jurisdiction hearing.

On May 12, 2011, mother submitted on the jurisdiction allegations after some modifications on the record, namely that the allegations that she was noncompliant with her current service plan and that she failed to maintain contact with the department be stricken. According to mother's counsel, mother had tested consistently and negative for illegal substances, and she was involved in a program that required her to have weekly contact with probation.

But counsel for the department argued that mother had not been in services long enough to adequately care for J.A. Counsel for the minor argued that he had "concerns" about "negative acting out behaviors" on J.A.'s part. The jurisdiction report made reference to J.A.'s temper tantrums while in foster care. During these tantrums she would throw items, "shoes, cookies or whatever," including the family dog. The dog subsequently died from internal bleeding.

The report prepared in anticipation of the disposition hearing stated that mother was participating in the reporting program for probation, she met with probation once a week, she drug tested for probation and for the social worker, she was participating in substance abuse services and individual counseling, but she had not as yet begun an age-appropriate parenting class. The social worker recommended continued family reunification services, describing mother as being "in the infancy of her quest for sobriety," and that J.A. needed a parent "free of substance abuse to be available to adequately and appropriately parent her as well as provide for her safety and protection."

A contested disposition hearing was held June 7, 13, 21 and 24, 2011. In response to mother's request that J.A. be placed in her custody under supervision of the court, social worker Augustine testified that, while mother was participating in services to address her substance abuse issue and that she had started an appropriate parenting class, the department felt "it [was] early in the stage of her progress" and they would like to see mother "complete the services and reunify with her child once the services are

completed.” Augustine described J.A.’s current placement with her half siblings as stable and, from her observation, the half siblings interacted with J.A. appropriately.

Mother’s treatment counselor, Pamela Campbell, testified that mother enrolled in the program on April 19, 2011. Since that time, mother had participated in two self-help meetings and two group meetings a week. Of the 16 possible sessions, mother had one excused absence and one “no-show.” Mother had also attended 3 one-on-one counseling sessions, and had drug tested once, on May 4, 2011, at the counselor’s request. Campbell explained that a minimum program consisted of six months. The program was controlled by Campbell’s assessment, and Campbell decided when to drug test mother and when, based on mother’s participation in treatment, mother would complete the program. Campbell believed that mother’s progress to that point was excellent. As for mother’s risk of relapse based on the time she had been sober, Campbell opined:

“... I’m not going to say in early recovery they have possibility of relapse. Myself I have 19 years of sobriety and if I’m not doing what I need to do to stay sober, I could relapse. So for me, personally, I think a person needs to get a support group, get meetings, etc., so I—I go in the mode it’s one day at a time. So it’s just today she has sobriety.”

Mother was attending Narcotics Anonymous meetings, but did not have a sponsor as yet because “it takes time” and usually occurs during the second or third month of sobriety.

Probation officer Cortes testified that mother was compliant with her program through probation, which was similar to a substance abuse treatment program.

The juvenile court subsequently denied mother’s request to return J.A. to her care under the supervision of the court. The court described mother as in “the earliest stages of her treatment,” and it was somewhat concerned that mother did not, as yet, have a Narcotics Anonymous sponsor. The court was also concerned, in part, about information regarding J.A.’s behavior in foster care. The court acknowledged “that it was not clear the connection” between J.A.’s behavior and anything mother did, but wanted the parents to “address these kinds of issues.” The court adopted the findings and orders

recommended by the social worker and ordered continued out-of-home placement, but set a three-month instead of six-month review.

Mother appeals these findings and order.

DISCUSSION

Mother's sole contention on appeal is that there is insufficient evidence to support the juvenile court's dispositional order removing the minor from her custody. According to mother, reasonable means were available to protect the minor while leaving her in mother's care. We disagree.

"At the disposition hearing, a child may not be removed from the custody of the parent(s) with whom he or she resided at the time the petition was initiated unless the court finds, by clear and convincing evidence, at least one of the matters set out in" subdivision (c) of section 361. (*In re Heather A.* (1996) 52 Cal.App.4th 183, 193.) Such matters include, "[t]here is ... a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor or would be if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's ... physical custody." (§ 361, subd. (c)(1).) The court must also "make a determination as to whether reasonable efforts were made to prevent or to eliminate the need for removal of the minor" and "state the facts on which the decision to remove the minor is based." (§ 361, subd. (d).)

In *In re Isayah C.* (2004) 118 Cal.App.4th 684, the court stated the governing general principles:

"We begin by noting that in dependency proceedings the burden of proof is substantially greater at the dispositional phase than it is at the jurisdictional phase if the minor is to be removed from his or her home. [Citations.] [¶] This heightened burden of proof is appropriate in light of the constitutionally protected rights of parents to the care, custody and management of the children. [Citation.] [¶] "Parenting is a fundamental right, and accordingly, is disturbed only in extreme cases of persons acting in a fashion incompatible with parenthood." [Citation.] 'In furtherance of these principles, the courts have imposed a standard of *clear and*

convincing proof of parental inability to provide proper care for the child and resulting detriment to the child if it remains with the parent, before custody can be awarded to a nonparent.’ [Citation.]” [Citation.]’ [Citations.] [¶] We review the record in the light most favorable to the trial court’s order to determine whether there is substantial evidence from which a reasonable trier of fact could make the necessary findings *based on the clear and convincing evidence standard*. [Citation.] Clear and convincing evidence requires a high probability, such that the evidence is so clear as to leave no substantial doubt. [Citation.]” (*Id.* at pp. 694-695.)

We therefore review these dispositional findings under the substantial evidence test. That is, “we draw all reasonable inferences from the evidence to support the findings and orders of the dependency court; we review the record in the light most favorable to the court’s determinations; and we note that issues of fact and credibility are the province of the trial court.” (*In re Heather A.*, *supra*, 52 Cal.App.4th at p. 193.)

Mother claims that there was no evidence of substantial danger to J.A. if she remained in her care. To support her argument, mother points to evidence that she participated in a probation department program three times a week, substance abuse services twice per week, support group meetings two times per week, and bimonthly counseling. She also argues that, even if relapse occurred, there was no evidence that it would put J.A. at a substantial risk of harm because, prior to court intervention, when she did relapse, she left J.A. with relatives while she used drugs.

Mother relies on *In re Henry V.* (2004) 119 Cal.App.4th 522 (*Henry V.*). In that case, the minor had unexplained burn marks on his buttocks and was detained. (*Id.* at pp. 525-526.) At the dispositional hearing, the juvenile court refused to return the minor to his mother’s care until a recommended bonding study had been completed. (*Id.* at p. 528.) Although the juvenile court found a substantial danger to the child if he was returned to the mother’s custody, the appellate court found a lack of substantial evidence to support the juvenile court’s conclusion. (*Id.* at p. 529.) It said:

“The fundamental right to the care and custody of one’s child is protected by Constitution and statute. [Citations.] A child may not be taken from a parent’s physical custody during juvenile dependency proceedings, except for a temporary detention period, unless clear and convincing evidence

supports a ground for removal specified by the Legislature. Removal on any ground not involving parental rejection, abandonment, or institutionalization requires a finding that there are no reasonable means of protecting the child without depriving the parent of custody. [Citations.]” (*Henry V.*, *supra*, at p. 525, fn. omitted.)

Specifically, the appellate court found no evidence that the juvenile court had understood or applied the clear and convincing evidence standard. (*Henry V.*, *supra*, 119 Cal.App.4th at p. 530.) Examining the evidence, the appellate court found that the single occurrence of physical abuse was not an obstacle to reunification. Although the expert recommended a bonding study before the child was returned home, the appellate court found that the study could be completed while the child was living in the home. In other words, the removal of the child from the mother’s custody could not be used to force mother to cooperate with out-of-home placement services. (*Id.* at pp. 529-530.)

The situation in *Henry V.* is distinguishable from the present case. In *Henry V.*, the neglect involved a single isolated instance of alleged abuse. Here, there is a lengthy history of substance abuse. The juvenile court had before it evidence that mother had previously graduated from a six-month drug abuse program in December of 2010, but thereafter tested dirty in both February and March of 2011. And while mother was compliant in her current case plan, she had barely completed two months of services and she had not yet gotten to the point in her sobriety where she obtained a sponsor. In addition, the court had before it evidence regarding delays in J.A.’s learning and her aggressive behavior, and mother had not yet completed an age-appropriate parenting class.

Mother also claims her case is similar to that in *In re Heather P.* (1988) 203 Cal.App.3d 1214, 1221-1222, overruled on other grounds in *In re Richard S.* (1991) 54 Cal.3d 857, 866, footnote 5. In *Heather P.*, the mother had a history of mental health issues and a very transient lifestyle, but by the time of the 12-month review hearing, she had met the elements of her family reunification plan, obtained a stable residence, and was working in a church nursery. (*In re Heather P.*, *supra*, at pp. 1222-1223.) Although

the mother had substantially complied with her case plan, the social worker opined that the minor could not be returned to her because she had not received a positive evaluation from her therapist. This court concluded that the evidence presented was not the type which could be deemed credible and of solid value and from which the juvenile court could conclude that the minor's physical or emotional well-being would be threatened if she were returned at the time of the review hearing. (*Id.* at pp. 1229-1230.) We find the facts in *Heather P.* distinguishable as this was not a review hearing but a dispositional hearing and mother had barely completed two months of services at the time and had a history of relapse.

The risks in returning J.A. to mother's actual physical custody were clear. We find substantial evidence in the record to support the juvenile court's dispositional order by clear and convincing evidence.

DISPOSITION

The juvenile court's June 24, 2011, order is affirmed.

DAWSON, Acting P.J.

WE CONCUR:

KANE, J.

FRANSON, J.